SUPREME COURT, U. S.
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No. [redacted]186

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES B. HENSLEY, *Petitioner*

v.

FORT WORTH AND DENVER RAILWAY COMPANY, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, FORT WORTH, TEXAS

Brief for Respondent In Opposition

STONE, TILLEY, PARKER, SNAKARD, LAW & BROWN
Thos. H. Law
Robert M. Randolph
1500 Fort Worth National Bank Building
Fort Worth, Texas 76102
Attorneys for Respondents

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4970

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No. 1417

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, FORT WORTH, TEXAS

Brief for Respondent In Opposition

The Respondent, Fort Worth and Denver Railway Company, prays that a writ of certiorari to review the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, Texas, be denied.

QUESTIONS PRESENTED

No federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. Petitioner has wholly failed to comply with the requirement of Supreme Court Rule 23 (1) (f), for the reason that Petitioner is unable to show from the record a timely and proper raising of any federal question.

Even had Petitioner properly preserved his grounds for complaint, the state trial and appellate courts did not misconstrue the federal decisions on res ipsa loquitur nor act contrary to any substantive right of Petitioner, as asserted by him.

STATEMENT

Petitioner's statement of the nature of the suit is at best misleading. His recitation of the facts explaining the derailment bears no recognizable similarity to the factual impact of the full record. The record shows that the derailment was caused by two little boys who played with the switch, there being nothing wrong with the switch itself. The jury obviously so believed; they found for Respondent, and the Court of Civil Appeals sustained their finding.

Petitioner takes alternative positions on the facts. First, he says that all things at the switch apparently were as they should have been — most importantly, the switch handle was in its socket on the switch— and that the accident happened without explanation, necessitating a finding for Petitioner on res ipsa loquitur. (Petition, p. 3) Second, he says that Respondent discovered that the switch handle was out of its slot but, having so discovered it and realizing the potential grave danger, nevertheless inexplicably failed to replace the handle in the slot; instead, that Respondent set in motion all its resources to determine who might have taken the handle out of the slot, conducting a full investigation and finally apprehending the two little boys, yet still never bothering

to correct the condition (the handle out of its slot) that resulted in all this activity! While this contention appears absurd on its face, it is not necessary for Respondent to rely on the absurdity alone in answer to it: it is clear from the testimony that Respondent made the discovery of the switch handle's being out of the slot only *after* the accident. (S.F. 214, 216, 226, 229-230, 261-262, 266-267, 276-277, 295-297) (The record not yet having been printed, references are to the Statement of Facts [S.F.], the Transcript [Tr], Plaintiff's Exhibits [PX] and Defendant's Exhibits [DX].)

1. The switch handle was not in its slot (socket)

The "Alley Lead" is an industry track serving several industries in Plainview, Texas. A track known as the "Magnolia spur," being a straight extension of the Alley Lead track, ties onto the Alley Lead at the beginning of a curve. A switch known as the "Magnolia switch" controls direction of movement at this track junction.

The directional movement at this switch is determined by the position of the "switch points," the pointed ends of the track which move from side to side and determine the track down which the flanged wheels are guided. (PX 8, 13) The two switch points are connected to each other by two "bridle rods." The whole apparatus is connected to an upright switch, the Magnolia switch, by a "connecting rod," which moves the switch points from side to side. The upright switch stands on a tripod, or "switch stand." A ver-

tical rod is tied to the connecting rod at the bottom end, a handle in the middle and a disk or "target" at the top. The position of the handle determines the position of the connecting rod and of the switch points. The target moves with the vertical rod and indicates the position of the switch points. The handle is secured by placing it in a slot or socket cut at the two proper positions in a metal plate. The handle is doubly secured in a slot by use of a small, horseshoe-shaped rod known as a "keeper."

During a switching movement, when the engine is pushing the cars, a brakeman rides on the leading end of the movement. The position of the switches is checked by observing the position of the switch points themselves and may be double-checked by observing the position of the target. This technique is considered by the industry to be safe, reasonable and prudent. (S.F. 257, 380-382, 423-424, 425) A brakeman approaching the Magnolia switch from the north (as in this case) would find his view of the handle largely obstructed by the switch stand. (S.F. 380-384) At night, a brakeman's view of the Magnolia switch handle would be even more obscure, since the area is not lighted. (S.F. 194)

Petitioner argues that the switch handle was in its proper socket and the points were properly aligned, but that the movement of the cars over the switch somehow unseated the handle and caused the switch points to open partially, thereby causing the cars to "split the switch" and derail, invoking the doctrine of res ipsa loquitur due to an unknown defect in the

switch. (Petition, p. 3) Petitioner's contention is based solely on the deposition testimony of Harvey J. Rucker, the brakeman on the leading end of the switch movement at the time of the accident. Mr. Rucker was led by belligerent interrogation into saying that he saw that the Magnolia switch handle was in the slot. (S.F. 195-196) This is the only evidence that the handle was in the slot prior to the movement.

Petitioner failed to sustain his burden of showing that the switch was defective, because the preponderance of the evidence does not show that the handle was in the slot. On the contrary, it shows that the handle was out of the slot, having been taken out by two little boys, and that this is what caused the derailment. Harvey J. Rucker testified upon trial that the points and the target were properly aligned. He did not shine his light on the handle, since the points and targets are the indicators. Anyway, he could not have seen the handle on the Magnolia switch at night from the north side. (S.F. 266-267, 270-271) T. S. Dial, the conductor, testified that one who approaches the Magnolia switch from the north would not be able at night to see whether the handle is out of the slot slightly, enough to allow free movement of the switch. (S.F. 257) L. B. Griffin testified that a brakeman on the right side of a car (Rucker's position) could not have seen whether the Magnolia switch handle was actually in the slot, since his view would have been blocked by the switch stand. (S.F. 383-384) Wm. H. Hogle testified that a brakeman in Rucker's position would have had to stop the train and walk over to the switch in

order to ascertain, with greater certainty than that indicated by the points and targets, that the handle was in the slot. (S.F. 410-411) Such action would not be normal or necessary in reasonable and prudent operations in the railroad industry. (S.F. 411)

Immediately after the accident, the switch handle was found out of the slot, resting on the plate. (S.F. 215-216, 277, 297) The switch was not damaged. (S.F. 240-242, 279, 291, 331-332) If in fact the handle had been secured in the slot and the wheel had split the switch due to a defective wheel or defective switch point, the bridle and connecting rods would have been bent or the switch points would have been broken, since the parts move in unison. (The handle could not be jarred or vibrated out of the slot. [S.F. 230-231])

On the other hand, assuming the handle was out of the slot just enough to be resting on the plate, the switch points would be free and the vibration of cars moving over the switch points would cause the points to move. This is what happened here. The handle not being secured, it moved with the points. The splitting of the switch by the vibration caused a derailment. (S.F. 224-225, 242, 270, 297-298) In the instant cause, the first car and leading truck of the second car passed safely through the switch and derailed. It was apparent that the switch was properly aligned when the first car passed through it, but following this vibration, the switch points split.

Not only does the evidence show that the switch points moved, derailing the train, because the handle was out of the slot, it also shows that the handle's

being out of the slot was a condition arising shortly before the accident. The crew involved in this accident had executed switch movements over the Magnolia switch earlier that same day without any mishap. (S.F. 265-266) In addition, the keeper on the Magnolia switch, which doubly secures the handle in the slot, was found after the accident on the ground about two feet away from the switch stand. The keeper could not have been dislodged from the handle by the derailment. Nor could the keeper have been on the ground very long, because it was in place when the switch was inspected the week preceding the accident, and it had not been on the ground long enough to become rusty. (S.F. 330-333)

The great weight of the evidence is consistent with Respondent's theory that the switch handle was out of the slot and that the vibration of the first car split the switch. It is inconsistent with Petitioner's theory that the handle was in the slot but was jarred out due to some unknown defective condition.

2. Respondent learned after the accident that two little boys had played with the switch

Joe Rodriquez was nine years old at the time of trial and would have been seven or possibly six at the time of the accident. (S.F. 355) He testified that one afternoon in October, 1963, when he was in the first grade in a Plainview school, he and another little boy named Joe left school later than usual. On their way home, they took a short cut by the railroad tracks. (S.F. 350-352)

"Q. And what happened down there at the railroad tracks, just tell the first thing that happened?

"A. I stopped to see something.

"Q. You stopped to see something?

"A. Yes, sir.

"Q. And did Joe do something?

"A. Yes, he went to the big thing there.

"Q. And what did he do?

"A. He pulled the thing down.

"Q. He pulled something down?

"A. And two things went down. And he couldn't find one thing.

"Q. He pulled something by the railroad track, did he,

"A. Yes.

"Q. And you say two things went down.

"A. I saw two things come out.

"A. Two things came out.

"A. Yes.

"Q. What did they look like — was one of them a little piece of metal,

"A. Yes, sir.

"Q. Now, what was it that he pulled down; was it a handle or what?

"A. It was a handle; like a handle.

"Q. Like a handle?

"A. Yes, sir.

"Q. Let me show you a picture here and see if it looked kind of like this thing. Joe, here is a picture and this is marked Plaintiff's Ex. 10; I don't guess you know what Plaintiff's Exhibit 10 is.

"A. It was a thing like this (indicating on picture).

"Q. It was a thing like this, and you are showing me this black thing in the picture; is that right?

"A. Yes, sir.

"Q. And that is what we call an up-right switch; I don't guess you knew what we called it, did you?

"A. No.

"Q. Is that what it looked like?

"A. Yes, and he pulled something.

"Q. And he pulled something on that big black thing?

"A. Yes, sir, and two things came out, a round thing like metal and the other thing like a handle.

"Q. All right. There was a round thing, like a little piece of metal that came out?

"A. Yes, sir.

"Q. And then there was a handle that came out too; is that right?

"A. We couldn't find the little piece.

"Q. All right. You couldn't find the little metal piece; is that right?

"A. Yes, sir.

"Q. But the handle was still on this big black thing; is that right. Was there a handle on here?

"A. Yes, sir.

"Q. All right. Now, did you try to put that — did you or he try to put that handle back?

"A. Both of us.

"Q. Both of you did?

"A. Yes, sir.

"Q. Could you put it back where it was?

"A. We tried and tried, but we couldn't.

"Q. You couldn't do it.

"A. And we started running."

(S.F. 352-355)

It is the Petitioner's alternative position on the facts that Respondent discovered the switch's condition, initiated an investigation and found and interviewed Joe Rodriquez that same afternoon, but with-

out replacing the handle in the slot. (Petition, pp. 4-5) Petitioner did not request a special issue on Respondent's alleged negligence in not replacing the handle in the slot, but instead apparently contends that such alleged failure destroys Respondent's explanation of the accident's cause and entitles Petitioner to a verdict based on res ipsa loquitur, as a matter of law.

Armond R. Cardinal, Assistant Chief of Police in Plainview at the time of the accident, testified that he assisted in the investigation of a derailment caused by someone's tampering with Respondent's switch about the middle of October, 1963. He and Respondent's investigator, Mr. Bradshaw, worked on the case. The boys they investigated were members of transient worker's families. (S.F. 340-348) Joe Rodriquez testified that he lives in El Paso and used to live in some other towns, including Plainview, where he and his friend played with the switch in October, 1963. He identified the switch as being of the same type as that in the picture of the Magnolia switch shown on Plaintiff's Exhibit 10. Later on a policeman and a railroad man came to see him and talked to him and his mother about the matter. (S.F. 349-356) Mrs. Eva Rodriquez, Joe's mother, testified that two men, "policemen from the railroad," came to see Joe a little before 5:00 o'clock one afternoon in the middle of October, 1963. Joe told them he had played with the switch. (S.F. 357-362) The evidence certainly is sufficient to permit the jury to believe, as they obviously did, that the switch involved in this investigation was the same switch involved in the accident.

Petitioner argues that the record shows that the

policeman and railroad man talked to Joe the same afternoon he had played with the switch, before the accident, and that no one had replaced the handle in the slot even though its condition was discovered prior to the accident. Petitioner's contention is based upon statements of Joe and of Mrs. Rodriquez, elicited on cross-examination, that the two men came to the house the same day Joe had played with the switch. (S.F. 356, 359, 360) The testimony thus given was in the form of "Yes" or "No" answers to leading questions. One witness was a nine year old boy; the other was a transient laborer's wife who was examined through an interpreter.

Joe testified that he left school later than usual that day and walked home, taking a short cut by the railroad track, where he and his friend played with the switch. (S.F. 351) Mr. Cardinal, the policeman, stated:

> "Q. And I will ask you whether or not you assisted in an investigation to determine whether someone *had tampered with a switch that caused a derailment* on the Fort Worth & Denver . . . on a Fort Worth & Denver industry track?
>
> "A. Yes, sir.
>
> "Q. And do you recall about when that was?
>
> "A. About the middle of October, 1963.
>
> "Q. All right. How did you go about making your investigation and what did you do?
>
> "A. Well, at first, Mr. Bradshaw came to the office and *told us what happened*, and so I went with him, and being kind of acquainted in the Mexican part of town and got to talking to first

> one kid and another that had returned from school, naturally they accumulate like wild birds, and they showed us about where those kids that run from . . ." (S.F. 340-341) (Emphasis supplied.)

It is apparent that Mr. Bradshaw, the railroad man, told the police "what happened," he told them that "someone had tampered with a switch *that caused a derailment* . . ." This is the "what happened" described immediately prior to Mr. Cardinal's use of the term, and the jury present would have properly so understood. After Mr. Bradshaw told the police about the "switch that caused a derailment on the Fort Worth & Denver," the two of them went to the Mexican part of town and questioned a number of children. The two men ultimately arrived at Joe's house to question him a little before 5:00 o'clock one afternoon. (S.F. 356, 358) The accident occurred between 7:00 and 8:00 on the evening of October 12.

For two reasons, it is clear that the sequence of events above described did not occur on the same afternoon. In the first place, Mr. Bradshaw went to the police *after the derailment*, since he told them at that time both of the discovery of the switch's condition and of the derailment. The afternoon on which Bradshaw and Cardinal went to Joe's house had to be a different day from the day on which Joe had played with the switch. The derailment would not yet have occurred at the time they talked to Joe (5:00 p.m.), for the occasion for talking to Joe was the occurrence of the derailment (7:00 p.m.). In the second place,

the jury could properly draw a reasonable inference from the events which transpired, rather than an absurd inference. It would not have been likely, if even physically possible: (1) for Joe and his friend to play with the switch after leaving school later than usual; (2) for someone to discover the switch handle out of the slot, *without replacing it in the slot* by a simple movement of the hand; (3) for that someone to inform Bradshaw that the switch had been tampered with; (4) for Bradshaw to go to the police; (5) for Cardinal and Bradshaw to question a number of children; and (6) for the two men to arrive at Joe's house "a little before five" o'clock.

The jury rejected the physical improbability of all these things happening at the end of a single afternoon, probably in the space of less than an hour and a half. The jury rejected the absurd inference that the discoverer of a switch's condition disobeyed company rules by not securing the switch handle, but complied with company rules by reporting his discovery. The jury rejected the further absurd inference that, even after talking with Joe, the railroad man and policeman did not secure the handle, but left it open to cause a derailment. The jury had abundant support in the evidence to find that the playing with the switch and the visit to Joe's house occurred on different days. Their finding is supported by explicit testimony and by a reasonable inference drawn from the testimony. The jury, who saw the trial, were amply justified in rejecting the "Yes" or "No" answers of Joe and Mrs. Rodriquez, made in reply to an artful cross-exam-

ination. The jury's finding that Petitioner had failed to sustain his burden of proof, is supported by evidence and is supported by sufficient evidence.

ARGUMENT

We have stated the facts in such detail because Petitioner's contentions are wholly dependent upon the theory that the jury found an unavoidable accident only because they believed he assumed the risks of his employment. (Petition, pp. 3-5, 9) The jury found that neither Petitioner nor Respondent was negligent and that the derailment was an unavoidable accident. "Unavoidable accident" was defined as an event not contributed to by the negligence of either party. It is obvious that the jury believed Respondent's explanation that the accident was caused by the two little boys. Petitioner's argument that the jury so found because they thought he had assumed the risks of his employment is mere conjecture.

1. Res Ipsa Loquitur

Petitioner claims that he is entitled to judgment, as a matter of law, under the doctrine of res ipsa loquitur. Respondent believes the facts shown in the Statement amply explain the cause of the accident, and the jury so found.

We have no quarrel with the cases on res ipsa loquitur cited by Petitioner. In *Sweeney v. Erving*, 228 U.S. 233, 57 L.Ed. 815, 33 S.Ct. 416 (1913), the following language appears:

"Where the circumstances of the occurrence

> that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, res ipsa loquitur — the thing speaks for itself — that is to say, *if there is nothing to explain or rebut the inference* that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence." (Emphasis supplied.)

Likewise, in *Jesionowski v. Boston & M. R. Co.*, 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 416, 169 A.L.R. 947 (1947) the court stated:

> "It is true that the jury might have found here that this accident happened as a result of the negligence of the deceased; but *although the respondent offered evidence to establish this fact it did not satisfy the jury.*" (Emphasis supplied.)

Explanation of the accident having been offered and properly accepted by the jury, there is no ground for a finding, as a matter of law, for Petitioner. The Court of Civil Appeals correctly sustained the trial court. (Petition, pp. 16-17)

2. The Court's Charge

Petitioner belabors the supremacy of federal substantive law in the F.E.L.A. field. We certainly do not disagree with the statement of the law, nor did the Court of Civil Appeals. (Petition, pp. 18-19) However, Petitioner has not shown that any Texas procedure

followed in the instant cause conflicted with federal substantive law, resulting in harmful error.

The reason Petitioner's three requested instructions supposedly should have been given, is that they "are a variant and departure from the usual rules governing the relationship of master and servant at common law. Without knowledge of the standard to be followed, and against which to measure the conduct of the master, it was not possible for the jury to intelligently answer" the special issues. (Application for Writ of Error, p. 18) In other words, it is reversible error not to instruct the jury generally on the law, where it varies from the common law.

Petitioner cites no authority for this novel proposition, though he apparently regards it as a substantive federal right which must be given effect over local law to the contrary. Nor does Petitioner offer any reason why the jury should be instructed on federal statutory modifications in the common law in cases in which the jury would not ordinarily be instructed on the common law itself. If the jury is presumed to know the law, it must be presumed to know all the law and not just the common law, unmodified by statute.

In fact, of course, the Court instructed the jury on so much of the law as it was necessary for the jury to know, and such instructions conformed with federal substantive F.E.L.A. law. (Tr. 17-19, 30) Nor was the jury permitted to speculate upon any supposed knowledge of unmodified common law, the Court instructing the jury that "in matters of law you must be governed by the instructions in this charge." (Tr. 30) For

the Court to have instructed the jury on the law, simply because it was a modification of the common law, would have amounted to a general charge on the law and error. 57 Tex.Jur.2d "Trial" §512.

No credence can be given to Petitioner's novel contention that instructions on the law must be given simply because the common law has been modified. Rather, each requested instruction must be tested on its own merits as to whether it was substantially correct and necessary. Petitioner apparently complains in this Court only of the trial court's refusal to instruct the jury on assumed risk, dropping his contentions as to the other two instructions requested.

Petitioner's Specially Requested Instruction No. 3 states:

> "You are further instructed that any action brought against any common carrier, such as the defendant, FORT WORTH & DENVER RAILWAY COMPANY, in this case, under or by virtue of any of the provisions of the Federal Employers' Liability Act to recover damages for injuries to any of its employees, such employee, such as the plaintiff in this case, shall not be held to have assumed the risks of his employment in any case where such injury resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

In the first place, a defense of assumed risk had not been pled, and the issue was not in the case. (Tr. 9-11) Petitioner claims, nevertheless, that such an instruction should have been given and that failure to do so was error due to an implied finding of assumed risk

is by the jury. The alleged implied finding of assumed risk is based on an argument that since either Petitioner or Respondent had to have been negligent, and neither was found negligent, but rather an unavoidable accident was found, the jury must have thought Petitioner assumed the risk of unsafe conditions. Therefore, continues Petitioner, the failure to instruct generally on the law of assumed risk caused the jury, in their ignorance of the modification of the common law, to find against Petitioner on the issues of safe condition and unavoidable accident. This is all coupled with an argument that submission of an unavoidable accident issue in a trial before a federal court, submitted to the jury on special interrogatories, though not error, is not good judicial administration, and that the State courts are bound to follow the same rule. (Petition, pp. 7-10)

The central fallacy in Petitioner's imaginative argument is the assumption that one of the two parties to this suit had to be responsible for the accident. The evidence shows that third parties — the two little boys — were the cause of the accident, and that neither Petitioner nor Respondent was at fault. The jury's answers show that they considered neither party to be at fault. The jury's answer to the issue on unavoidable accident conclusively shows that they believed and found the accident to have been caused by the little boys. (Tr. 20-29) The great weight of the evidence supports these findings, and the findings certainly are not contrary to the weight of the evidence. This being so, we certainly cannot assume with Petitioner that

the jury impliedly found an assumption of risk by Petitioner. Nor can we pile assumption on assumption, that submission of Petitioner's instruction on assumed risk would have led to a different result, there being no properly supported point of error that the jury improperly considered assumed risk at all. The jury's findings of no negligence and unavoidable accident indicate simply that they considered the little boys to be the cause, not Petitioner's imaginative theory based upon a disregard of the evidence.

Petitioner quotes at length from *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609 (5th Cir. 1966), apparently contending that the finding of unavoidable accident should be disregarded in determining whether the jury impliedly found an assumption of risk. In any event the case is not cited in support of any supposed error arising from submission of the unavoidable accident issue. The *Mills* case was tried in federal court and submitted to the jury on special interrogatories. The jury found no negligence by either party and unavoidable accident. The Court of Appeals reviewed the evidence at great length and found negligence (unseaworthiness) as a matter of law. The court then found that the finding of unavoidable accident would be controlled by the finding on defendant's negligence. The court stated that the submission of unavoidable accident was a mere cross-examination of the jury's answers on plaintiff's and defendant's negligence, causation and percentage reduction of damages. The court considered that unavoidable accident "*ordinarily*" ought not be sub-

mitted, as a "matter of good judicial administration," but certainly did not indicate that submission would constitute reversible error, especially since a finding on unavoidable accident is controlled by the findings on negligence. In the instant cause the issue was properly submissible even under the federal rule, since the answer would clearly reveal the causation found by the jury, as answers to the negligence issues alone would not have done. No objection was made to submission of this issue, nor has error been assigned in the motion for new trial and Petitioner's brief in the Court of Civil Appeals. (Tr. 34) Even if there were error, which we do not believe, Petitioner did not preserve it. Even if there were error, it would have been harmless, since the finding on the unavoidable accident issue explains and supports the findings on the negligence issues, rather than conflicting with them as in the *Mills* case. In any event, no error is shown which would "affect the substantial rights of the parties." 28 U.S.C. § 2111.

Other than the contentions that the jury must be instructed generally on modifications in the common law and that we must *assume* that the jury improperly deemed Petitioner to have assumed the risk, which would have been prevented by an instruction on assumed risk, Petitioner presents no authority supporting his third requested instruction. The submission of such an instruction would have been erroneous as being a general charge on the law, in addition to being a charge on an issue not even involved in the case.

CONCLUSION

Respondent prays that the Court deny the petition for writ of certiorari.

Respectfully submitted,

STONE, TILLEY, PARKER, SNAKARD, LAW & BROWN

By _____
Thos. H. Law

_____
Robert M. Randolph

1500 Fort Worth National Bank Building
Fort Worth, Texas 76102
Attorneys for Respondent

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Brief for Respondent in Opposition has been placed in the United States Mail by certified mail, return receipt requested, addressed to Mr. Denning Schattman, Spurlock & Schattman, 304 Union Bank Building, Fort Worth, Texas 76102, attorney for Petitioner herein, on this 14 day of June, 1967.

_____
Thos. H. Law